



BRB No. 16-0325 BLA

ROGER L. HUBBARD)	
)	
Claimant-Respondent)	
)	
v.)	
)	
HUBBARD MINE CONSTRUCTION)	DATE ISSUED: 04/24/2017
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Dana Rosen,
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin and M. Rachel Wolfe (Wolfe Williams &
Reynolds), Norton, Virginia, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for
employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and
ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-06050)
of Administrative Law Judge Dana Rosen, rendered on a miner's claim filed on March
31, 2011, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C.
§§901-944 (2012) (the Act). The administrative law judge credited claimant with 31.15
years of underground coal mine employment, based on the stipulation of the parties, and

found that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).¹ The administrative law judge then concluded that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in determining that it did not rebut the presumed existence of clinical and legal pneumoconiosis or the presumed causal relationship between claimant's totally disabling respiratory impairment and pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Once claimant invokes the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,⁴ or by establishing that "no

¹ Under Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

² We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant: had 31.15 years of underground coal mine employment; suffered from a totally disabling respiratory impairment; and invoked the rebuttable presumption at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ The record reflects that the miner's last coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁴ Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine

part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

Employer contends that the administrative law judge erred in rejecting the opinions of Drs. Rosenberg and Dahhan "because he felt that they did not address how they were able to exclude coal dust exposure as a contributing factor in [c]laimant's impairment." Employer's Brief at 7. Specifically, employer asserts that both physicians "explained in detail" why claimant's respiratory impairment is not "'significantly' or 'substantially' related to coal dust exposure." *Id.*

Contrary to employer's contention, the administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Dahhan on the issue of legal pneumoconiosis. The administrative law judge accurately noted that Drs. Rosenberg and Dahhan excluded a diagnosis of legal pneumoconiosis based, in part, on claimant's response to bronchodilators on pulmonary function testing.⁵ Decision and Order at 31; Employer's Exhibits 3, 6. Noting that "reversibility [on pulmonary function testing] does not preclude the possibility of pneumoconiosis," the administrative law judge permissibly determined that Drs. Rosenberg and Dahhan did not adequately explain why a response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. Decision and Order at 31-32, *citing Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007) and *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012). In addition, the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Dahhan because they did not explain why

employment." 20 C.F.R. §718.201(a)(2). Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

⁵ Dr. Rosenberg stated that "[t]he presence of smoking-related obstruction is also consistent with [claimant's] marked bronchodilator response[.]" reasoning that "[o]bstruction related to legal [pneumoconiosis] would be expected to be fixed in nature[.]" Employer's Exhibit 3. Dr. Dahhan, in response to a question about the significance of claimant's reversibility with bronchodilators, stated that "[a]n individual with a fixed defect would not demonstrate that kind of response to bronchodilator administration." Employer's Exhibit 6.

coal mine dust could not also have been a causal factor, in addition to smoking, in claimant's disabling obstructive impairment. Decision and Order at 30, 32; *see Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

Further, the administrative law judge accurately observed that Drs. Rosenberg and Dahhan eliminated coal dust exposure as a source of claimant's disabling obstructive pulmonary impairment, in part, because they found that the marked decrease in claimant's FEV1 and FEV1/FVC ratio is inconsistent with coal mine dust-induced lung disease.⁶ Decision and Order at 30-32; Employer's Exhibits 3-7, 11. The administrative law judge permissibly discredited their opinions because she found that their premise conflicted with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulations. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-130. As observed by the administrative law judge, the DOL relied on the summary of the medical literature developed by the National Institute for Occupational Safety and Health (NIOSH) in conjunction with its determination of a permissible dust exposure limit. The DOL observed:

[I]n developing its recommended dust exposure standard, NIOSH carefully reviewed the available evidence on lung disease in coal miners. NIOSH also considered the strength of the evidence, including the sampling and statistical analysis techniques used, and concluded that the science provided a substantial basis for adopting a permissible dust exposure limit. NIOSH summarized its findings . . . as follows: "In addition to the risk of simple [coal workers' pneumoconiosis] and [progressive massive fibrosis], epidemiological studies have shown that coal miners have an increased risk of developing COPD. COPD may be detected from decrements in certain measures of lung function, *especially FEV1 and the ratio of FEV1/FVC.*"

⁶ Dr. Rosenberg found that claimant "has a marked decrease in FEV1 down to 42% predicted with a marked decrement of his FEV1/FVC ratio down to 36% predicted . . . this pattern of impairment is inconsistent with one related to past coal mine dust exposure." Employer's Exhibit 3. In a supplemental report, Dr. Rosenberg reiterated that claimant's "pattern of impairment . . . is inconsistent with one related to past coal mine dust exposure and the presence of [coal workers' pneumoconiosis]." Employer's Exhibit 11. Dr. Dahhan indicated that "[t]he amount of loss in the FEV1 that [claimant] demonstrates cannot be accounted for by coal dust exposure per se according to the literature." Employer's Exhibit 5.

65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000), *quoting* NIOSH *Criteria Document* 4.2.3.2 (citations omitted) (emphasis added); Decision and Order at 30-31.

With respect to the administrative law judge's reference to the preamble, employer asserts, generally, that the opinions of Drs. Rosenberg and Dahhan "are not inconsistent with the preamble and fully explain why in the [c]laimant's case, there was not significant contribution to his impairment by coal dust exposure." Employer's Brief at 7. Employer also argues that the administrative law judge "ignores large portions of the opinions of Drs. Dahhan and Rosenberg in favor of broad generalizations based on assertions made in the preamble to the regulations." *Id.* Employer further states that "[t]he [administrative law judge's] rationale for rejecting Dr. Rosenberg's opinion was that he relied on more recent medical science rather than the 15+ year old studies cited in the preamble to the amended regulations." *Id.* at 3.

To the extent employer is arguing that the administrative law judge erred in relying on the preamble in discrediting Dr. Rosenberg's and Dr. Dahhan's opinions, that argument is rejected. The Board and multiple circuit courts have held that an administrative law judge may permissibly rely on the medical science credited by the DOL in the preamble in assessing the credibility of the medical opinion evidence. *See Looney*, 678 F.3d at 305, 25 BLR at 2-130; *A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011). With respect to employer's general statement that Dr. Rosenberg "relied on more recent medical science" to support his opinion, employer does not identify the specific new studies that Dr. Rosenberg relied on, nor does employer explain how these studies or Dr. Rosenberg's critiques of the studies cited in the preamble invalidate the medical science underlying the DOL's recognition that coal dust exposure can cause obstructive lung disease that is detectable from reductions in the FEV1 and FEV1/FVC ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013); *Looney*, 678 F.3d at 314-16, 25 BLR at 2-130.

For the foregoing reasons, we affirm the administrative law judge's finding that the opinions of Drs. Rosenberg and Dahhan are inadequately explained and are thus insufficient to rebut the presumed existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).⁷ *See Bender*, 782 F.3d at 137, 25 BLR at 2-699; *Minich*, 25

⁷ Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). We therefore need not address employer's contentions of error regarding the administrative law judge's finding that employer also failed to establish that claimant does not have clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Additionally, because the opinions of Drs. Rasmussen, Gallai,

BLR at 1-154-56; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Employer raises no separate allegations of error with respect to the administrative law judge's finding that employer failed to disprove the presumed causal relationship between claimant's total disability and pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). Because the administrative law judge's discrediting of the opinions of Drs. Rosenberg and Dahhan on the issue of total disability causation was based on her permissible credibility findings on the issue of legal pneumoconiosis, we affirm the administrative law judge's determination that employer failed to establish rebuttal at 20 C.F.R. §718.305(d)(1)(ii). *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-444 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 34-35.

and Green do not support employer's burden on rebuttal, we need not address employer's arguments with respect to the administrative law judge's finding that they provided reasoned and documented opinions that claimant has legal pneumoconiosis. *See West Virginia CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge